



United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Tennessee Valley Authority--False Claims Act Recoveries

File: B-281064

Date: February 14, 2000

DIGEST

The Tennessee Valley Authority (TVA) Act, 16 U.S.C. §§ 831n-4(f), 831y, does not authorize TVA to deposit in the TVA Fund double and treble damages recovered under the False Claims Act, 31 U.S.C. § 3729. TVA should deposit in the Fund that portion of False Claims Act recoveries that represent TVA's actual losses (*i.e.*, single damages) and investigative costs that TVA incurred as a result of false claims.

DECISION

The Inspector General of the Tennessee Valley Authority (TVA) asks whether the TVA Act permits TVA to deposit in the TVA Fund the full amount of any recovery by the United States pursuant to the False Claims Act, 31 U.S.C. § 3729, including double and treble damages. The False Claims Act authorizes the government to recover a civil penalty of \$5,000 to \$10,000, plus two or three times the amount of damages that the government sustained because of a false or fraudulent claim filed with the government. 31 U.S.C. § 3729(a). Currently, the Department of Justice (Justice), which litigates all actions brought by the United States pursuant to the False Claims Act, turns over to TVA only single damages recovered in actions involving false claims filed with TVA. Justice deposits any double and treble damages into the U.S. Treasury pursuant to 31 U.S.C. § 3302. For the reasons stated below, we conclude that the TVA Act does not authorize TVA to deposit double and treble damages into the TVA Fund. TVA should deposit into the Fund any recoveries of actual damages it incurred as a result of a false claim (*i.e.*, single damages), as well as any costs it incurred in investigating the false claim.

Background

TVA was created by the Tennessee Valley Authority Act of 1933 (TVA Act), 16 U.S.C. § 831. TVA, a wholly owned government corporation and instrumentality of the United States, supplies electric power to customers in seven states. It finances its operations using proceeds earned from the sale of power and borrowings. 16 U.S.C. §§ 831n-4, 831y. The TVA Act requires that TVA charge rates for power that will

produce sufficient revenues to provide funds for operation, maintenance, administration and other specified costs. 16 U.S.C. § 831n-4(f). TVA deposits revenues into the TVA Fund. The Act, however, requires TVA to transfer to the U.S. Treasury any amounts excess to its operational needs. 16 U.S.C. § 831y.

The Act authorizes TVA to “sue and be sued in its corporate name.” 16 U.S.C. § 831c(b). Using this authority, TVA attorneys conduct all litigation on behalf of TVA except civil actions for false claims under the False Claims Act. Justice investigates violations of the False Claims Act and brings civil actions against persons who obtain payments from the government, including TVA, through false claims. The False Claims Act authorizes the government to recover a civil penalty of \$5,000 to \$10,000, plus double or treble the amount of damages sustained as a result of filing a false claim. 31 U.S.C. § 3729(a). Currently, when Justice prevails in actions involving TVA losses from false claims, Justice remits to TVA for deposit in the TVA Fund that portion of a False Claims Act recovery that equals single damages, i.e., TVA’s actual damages, to compensate TVA for its losses. Justice deposits the balance of double or treble damages into the general fund of the U.S. Treasury as miscellaneous receipts.

TVA has asked Justice to transfer to TVA the entire amount of False Claims Act recoveries, including double and treble damages, not just single, or actual, damages. Justice has refused to do so absent a Comptroller General decision. If we conclude that TVA may not receive the entire amount of any False Claims Act recovery, TVA asks us to consider whether TVA may recover, as a reimbursement to the TVA Fund, its administrative costs in investigating a false claim, as well as actual damages. TVA notes that although Justice brings the civil action on behalf of TVA, TVA incurs investigative costs related to the false claim.

Discussion

In the absence of specific statutory authority, an agency must deposit moneys received for the use of the United States into the general fund of the Treasury as miscellaneous receipts. 31 U.S.C. § 3302. There are two exceptions to this requirement: (1) where an agency is specifically authorized to retain moneys it collects, and (2) where the moneys received qualify as refunds to appropriations. 69 Comp. Gen. 260, 261-262 (1990). In these instances, an agency can deposit the moneys into an appropriation account or fund for subsequent obligation and expenditure. 62 Comp. Gen. 678, 679 (1983). For example, when a program is funded out of a revolving fund, the enabling legislation ordinarily authorizes the agency to deposit program income into the revolving fund. 62 Comp. Gen. 70, 72 (1982). An agency must have express authority to retain moneys collected, however, even where those moneys might relate in some way to the agency’s programs. See, generally, 40 Comp. Gen. 356, 359 (1960).

Clearly, the second exception applies to the recovery under the False Claims Act of TVA’s actual losses, and TVA may deposit these amounts as refunds to the TVA

Fund. “Refunds” are returns of advances, collections for overpayments, adjustments for previous amounts disbursed, or recovery of erroneous disbursements from appropriations or fund accounts that are directly related to, and are reductions of, previously recorded payments from the accounts. 7 GAO Policy and Procedures Manual for the Guidance of Federal Agencies, § 5.4.A.1. Under the “refund” exception, TVA may credit the TVA Fund with that portion of a False Claims Act award or settlement that represents a reimbursement of moneys erroneously disbursed from the Fund. False Claims Act single damages represent the recovery of moneys erroneously disbursed on the basis of a false claim, that is, TVA’s actual losses.¹ In addition to single damages, the “refund” exception permits TVA to cover into the TVA Fund investigative costs that are directly related to the false claim. These are a direct consequence of the false claim paid, and increased TVA’s losses. See, e.g., 69 Comp. Gen. at 263.

TVA’s Inspector General argues, however, that TVA falls within the first exception. The Inspector General asserts that because the TVA Act authorizes TVA to retain proceeds from “any other activities of the Corporation,” TVA can credit the TVA Fund with the amounts of double and treble damages that Justice recovers under the False Claims Act, not just single, or actual, damages. He characterizes False Claims Act recoveries as compensatory in nature, and contends that if TVA could not apply the entire amount of a False Claims Act recovery to its power program, it could not fully compensate its power customers for the loss they sustained from the false claim. The Inspector General likens False Claims Act recoveries to Clayton Act recoveries, pointing out that federal courts have upheld TVA’s authority to pursue treble damages under the Clayton Act.

We disagree with the Inspector General. Double and treble damages recovered pursuant to the False Claims Act are exemplary damages, not actual losses, “because they are not limited to, but rather substantially exceed, the actual damages suffered by the United States.” United States ex rel. Graber v. City of New York, 8 F. Supp. 2d 343, 349 (S.D.N.Y. 1998). In the absence of statutory authority, agencies must deposit into the Treasury amounts recovered that are in the nature of penalties. See, e.g., 70 Comp. Gen. 17, 19 (1990); 39 Comp. Gen. 647, 649-50 (1960). While the TVA Act authorizes TVA to credit the Fund with proceeds from its commercial and proprietary activities, the TVA Act does not expressly or by reasonable implication contemplate the deposit of exemplary damages to the Fund. The Act provides that

“ . . . the proceeds for each fiscal year derived by the [TVA] Board from the sale of power or any other products manufactured by the Corporation, and from any other activities of the Corporation including

¹ See Letter from Director, Commercial Litigation Branch, Civil Division, Department of Justice to the United States Attorney, Eastern District of Tennessee (July 31, 1997) (referring to TVA’s “lost single damages”).

the disposition of any real or personal property, shall be paid into the Treasury of the United States . . . except such proceeds as in the opinion of the Board shall be necessary for the Corporation in the operation of dams and reservoirs, in conducting its business in generating, transmitting, and distributing electric energy and in manufacturing, selling, and distributing fertilizer and fertilizer ingredients.” 16 U.S.C. § 831y.

Crediting the TVA Fund with amounts of False Claims Act double and treble damages, therefore, would augment the Fund with proceeds unrelated to its commercial and proprietary activities. We find no basis in the False Claims Act to suggest that individual agencies may supplement their appropriations with False Claims Act double and treble damages, nor do we find any basis in the TVA Act or its legislative history to support an interpretation allowing TVA to recover and retain amounts in excess of its costs. See 69 Comp. Gen. at 262.² Consequently, we disagree with TVA’s Inspector General that the TVA Act permits TVA to credit the TVA Fund with the full amount of False Claims Act damages to the extent that damages assessed exceed the amount of TVA’s actual losses.

We also disagree with the Inspector General’s contention that TVA must apply the entire amount of a False Claims Act recovery, including double and treble damages, to its power program in order to fully compensate its power customers for losses they sustain. As explained above, crediting the amount of single, or actual, damages as refunds to the TVA Fund will fully reimburse TVA and its customers for their losses. Exemplary damages, such as False Claims Act double and treble damages, do not represent actual losses.

In this regard, we disagree with the Inspector General’s characterization of all False Claims Act recoveries as compensatory in nature. In support of his characterization, the Inspector General cites several federal court decisions that address the nature of False Claims Act damages, including a 1989 Supreme Court decision, United States v. Halper, 490 U.S. 435 (1989), and a 1996 federal court of appeals decision, United States v. Brekke, 97 F.3d 1043 (8th Cir. 1996). The Inspector General quotes the Halper Court as recognizing “that in the ordinary case fixed-penalty-plus-double-damages provisions can be said to do no more than make the Government whole.” Halper, 490 U.S. at 449. He quotes the Eighth Circuit Court describing False Claims Act damages as “compensatory rather than punitive.” Brekke, 97 F.3d at 1048. The Inspector General has taken these courts’ characterizations of False Claims Act damages out of context, and his reliance on these decisions is misplaced.

²The Federal Emergency Management Agency’s (FEMA) authority pursuant to the Urban Property Protection and Reinsurance Act to retain a variety of fees and charges, including “receipts from any other source,” did not permit FEMA to retain amounts of double and treble damages recovered in False Claims Act awards.

The issue before these courts, as stated in Halper, was when a False Claims Act “civil penalty” of double or treble damages would constitute “punishment” for the purposes of double jeopardy.³ Halper, 490 U.S. at 436. (Brekke addresses when a False Claims Act penalty constitutes punishment for purposes of application of the doctrine of res judicata.⁴ Brekke, 97 F.3d at 1047-48.) While these courts noted that False Claims Act double and treble damages included a compensatory element, they also recognized that they contain a penalty element. “It is commonly understood that civil proceedings may advance punitive as well as remedial goals.” Halper, 490 U.S. at 435. “Simply put, a civil as well as criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment.” Id. at 448. “A multiple recovery of this type is compensatory rather than punitive, even though it contains a penalty element, unless the amount sought by the government ‘bears no rational relation to the goal of compensating the Government for its loss.’” Brekke, 97 F.3d at 1048, citing Halper, 490 U.S. at 449.

The Supreme Court in Halper stated the following rule for courts to apply: where a defendant previously has sustained a criminal penalty and the civil penalty for damages sought under the False Claims Act in a subsequent proceeding bears no rational relation to a goal of compensating the government for its loss, but rather appears to qualify as punishment “in the plain meaning of the word,” “the defendant is entitled to an accounting of the Government’s damages and costs to determine if the penalty sought in fact constitutes a second punishment.” Halper, 490 U.S. at 449-50. The Court emphasized the narrowness of its ruling, stating that “[n]othing in today’s ruling precludes the Government from seeking the full civil penalty against a defendant who previously has not been punished for the same conduct, even if the civil sanction is punitive.” Id. Contrary to the Inspector General’s assertion, the courts have characterized False Claims Act double and treble damages as having both compensatory and punitive elements. As we stated earlier, we find no basis in the TVA Act or its legislative history to support a proposition that TVA may augment the TVA Fund with punitive False Claims Act damages—double and treble damages. In the absence of statutory authority, these amounts must be deposited into the Treasury.

³ The Constitution’s double jeopardy clause provides that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. Const. Am. 5. The clause protects against (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. Halper, 490 U.S. at 440.

⁴ Res judicata bars a party from asserting a claim in court if (1) a prior judgment was rendered by a court of competent jurisdiction; (2) the decision was a final judgment on the merits; and (3) the same cause of action and same parties are involved in both cases. Brekke, 97 F.3d at 1047.

The Inspector General, in his letter to us, compared False Claims Act damages to Clayton Act damages, suggesting that because federal courts have upheld TVA's authority to pursue a claim for treble damages under the Clayton Act,⁵ we, by analogy, should not object to TVA covering into the TVA Fund double and treble damages under the False Claims Act. (The Clayton Act imposes treble damages on persons who violate antitrust laws. 15 U.S.C. § 15.) Whatever may be TVA's rationale for retaining multiple damage awards under the Clayton Act, the fact that it does so does not change our views regarding False Claims Act damages.

In conclusion, while we disagree with the Inspector General's argument that TVA falls within the first exception to the miscellaneous receipts statute, the second exception applies to single damages and investigative costs recovered under the False Claims Act. Accordingly, Justice may transfer these amounts to TVA for deposit in the TVA Fund.

Comptroller General
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⁵See United States v. General Electric Co., 209 F. Supp. 197 (E.D. Pa. 1962).